IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1781

In the Matter

—of—

JACOB P. LEFKOWITZ,

Bankrupt-Petitioner.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ADDITIONAL REASON FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals (Appellant's Appendix 1a-3a) sought to be reviewed is in conflict with a very recent decision of the Third Circuit Court of Appeals, *In Re Decker*, 20 C.B.C. 173 (CA-3, 1979, 78-2007), (Supplemental Appendix, 1sa-8sa) holding that Bankruptcy Rule 407 places the burden of persuasion upon the trustee seeking to deny a discharge, under Section 14c(2) of the Bankruptcy Act, to prove the inadequacy of the bankrupt's books and records.

Decker involved a real estate developer with assets in excess of $62 million and liabilities of $56 million, who

filed a petition for a real property arrangement under Chapter XII of the Bankruptcy Act, 11 U.S.C. 801-926, (1976), who was subsequently adjudicated a bankrupt. The trustee objected to Decker's discharge, *inter alia*, on the grounds that Decker failed to produce accurate and complete records of his affairs. The Bankruptcy Court denied his discharge and the District Court affirmed.

The Third Circuit reversed the District Court and remanded it for further proceedings consistent with its opinion. The Court of Appeals concluded that it was evident from the cases cited therein, that the Bankruptcy Judge has misapplied the standard of proof required by Bankruptcy Rule 407 and had erroneously applied the standard of proof as set forth in the proviso to Section 14c of the Bankruptcy Act, which the Court of Appeals determined to be now defunct. Under Section 14c, as mentioned previously, the burden of ultimate persuasion shifted to the bankrupt once the objector had made out a *prima facie* case. But under Rule 407, as the Circuit Court correctly held, the burden of persuasion was at all times on the trustee.

The Court elaborated by stating that a trial judge is not compelled to accept a plaintiff's testimony even if uncontradicted. (Id. at 179) Even in the absence of an explanation by a bankrupt, such is not, in and of itself, enough to compel a Bankruptcy Judge to accept a trustee's allegations. The trustee carries the burden of proving all the elements of his allegations.

The case at bar presents a situation similar to that of the *Decker* case. Although the Bankruptcy Judge and the affirming District and Circuit Courts paid lip service to Rule 407, it is obvious from their respective opinions that they were applying the standard of proof contained in the

proviso to Section 14c of the Bankruptcy Act, which standard of proof has been superseded by Rule 407, in effect since October 1, 1973.

The Bankruptcy Judge's decision is replete with examples of his misapplication of the current law. A reading of the Bankruptcy Judge's findings of fact clearly shows that the Bankruptcy Judge, contrary to the letter of the law, placed the burden of proof and explanation upon the bankrupt.

In Paragraph 6, (15a), the Bankruptcy Judge, while admitting that the bankrupt turned over to the trustee all of his checkbooks, cancelled checks and bank statements, found these records inadequate to show the source of the monies received by the bankrupt. But then, in Paragraph 8, (16a), the Judge contradicts himself by stating that "he (bankrupt) received borrowed funds from various sources which he used to repay outstanding loans, as revealed by the information contained in his checkbooks, cancelled checks and list of lenders". The bankrupt, in his testimony, stated that his diaries reflected the source of monies, whether fees or loans, and that by correlating the diaries with deposit slips, he could determine who paid him and what the purpose of the payment was, and also, when such payment was deposited. The veracity of the bankrupt's unrebutted testimony was never in issue or questioned.

Again in Paragraph 17, (19a), the Bankruptcy Judge states that deposit slips could not stand as evidence of the receipt of fees because they lacked notations as to the source of the monies deposited. This is in direct contradiction to the testimony given by the bankrupt wherein he explained that because he had only fifteen to twenty clients per year, he did not require an intricate bookkeeping sys-

tem and was able to ascertain fees given by correlating the dates of the deposit slips with notations in his diaries.

Finally, the Bankruptcy Judge held that because the records produced were disordered, they were inadequate to ascertain the financial condition and business transactions of the bankrupt, Paragraph 19 (20a). However, the Bankruptcy Judge failed to note that the documents were in such a state only because the trustee deliberately presented them in that manner. They had been delivered in an original correlated condition but presented in disarray by the trustee. Despite this fact, the bankrupt was able to explain each and every transaction which took place. The trustee failed to bring to light any specific instances in which the bankrupt was unable to adequately explain all business transactions.

The tenor throughout the Bankruptcy Judge's summation of law also reflects a belief on his part that the bankrupt carried the burden of proof as to the adequacy of his records. The Bankruptcy Judge, in his opinion, created a 'condition precedent' for obtaining a discharge under Section 14 of the Bankruptcy Act wherein such condition precedent does not exist. (25a) Section 14c(2) states that a Court *shall* grant a discharge unless satisfied that the bankrupt failed to keep or preserve records from which his financial condition might be ascertained. Rule 407 requires the trustee, in order to block a discharge under Section 14c(2), to prove the records are inadequate. Thus, unless the trustee proves the records are inadequate, the discharge must be granted as a matter of course. *Liebke* v. *Thomas*, *supra*. The condition precedent, if any, is upon the trustee to prove his objection.

The District Court's opinion affirming the Bankruptcy Court is also quite obviously tainted with the view that

the bankrupt must disprove the charge of inadequate records. The Court held that the Bankruptcy Judge was within his authority in finding that "documents which can be made intelligible only through his 'interested' testimony —which the judge may or may not credit—has failed to adequately establish the financial condition as required by the Act". (8a) The bankrupt's "interested" testimony consisted of presenting his checkbooks, diaries, deposit slips, cancelled checks, pocket memoranda, a vast amount of promissory notes and letters from lenders and his unrebutted and uncontradicted oral testimony. At no time during the trial was the bankrupt at a loss to explain any and all of his business transactions, as was reflected by the records presented by the trustee. Additionally, the bankrupt's testimony was buttressed by that of his accountant, whose testimony was also uncontradicted.

The Court of Appeals further compounded the lower courts' mistakes by affirming the decisions below and holding that "Rule 407 in no way relieves the (bankrupt) of his burden of producing adequate records". (3a) The Court of Appeals has thereby approved the legal concept of placing the burden of proof on the shoulders of the bankrupt, rather than the objecting trustee, which is at conflict with the decision of the Third Circuit.

Certiorari should be granted, so as to resolve the apparent conflict between the Court of Appeals for the Second and Third Circuits, and thereby promulgate a clear standard of proof required in objections to discharge under this Section of the Bankruptcy Act and the new Bankruptcy Code.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Supplemental Appendix

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Sotelo, 436 U.S. 268, 274, 56 L.Ed.2d 275, 281, 98 S.Ct. 1795, 1801, 11 U.S.C.A. § 35(a)(1)(e),[3] that a § 6672 liability, whether or not levied within three years preceding bankruptcy, is not dischargeable in bankruptcy. Appellant's argument to the contrary bears no merit.

Alternatively, appellant argues for the first time on appeal, that he was not a "person required to collect, truthfully account for, and pay over any tax" within the meaning of § 6672. Since we find no indication in the record that appellant raised this contention or supported it by controverting affidavits before the Bankruptcy Judge or the District Court, we hold that, on the facts before the Court, summary judgment was properly granted.

Affirmed.

In the Matter of MARTIN M. DECKER and KATHLEEN H. DECKER, Bankrupts

No. 78-2007

(3d Circuit, C.C.A., March 26, 1979. Before: Hunter and Weis, Circuit Judges and Stapleton, District Judge*)

The bankrupt was denied a discharge under Section 14c(2) of the Act on the ground that he had failed to keep or preserve books of account or records from which his financial condition and material business transactions might be ascertained. The district court affirmed.

On appeal, the Court of Appeals reversed, holding that the burden of proof as to the adequacy of the records had been improperly imposed on the bankrupt rather than on the trustee. Though Section 14c(2) had placed the burden of proof on the bankrupt, this provision was superseded by Bankruptcy Rule 407.

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[3] 11 U.S.C.A. § 35(a)(1)(e) states that

"[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however*, That a discharge in bankruptcy shall not release a bankrupt from any taxes (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; * * *."

* Of the United States District Court for the District of Delaware, sitting by designation.

[1] Rule 407. Denial of Discharge Because of Inadequate Records; Burden of Proof.

Rule 407 supercedes Section 14c(2) with respect to the burden of proof allocation, and thus the burden of persuasion rests upon the trustee in seeking to deny a discharge, to prove the inadequacy of the bankrupt's records. (Collier on Bankruptcy, 14th ed., **12:**407.3[1])

HUNTER, Circuit Judge: 1. Martin M. Decker, the bankrupt, appeals from the district court's judgment denying him a discharge in bankruptcy under section 14c(2) of the Bankruptcy Act, 11 U.S.C. § 32(c)(2) (1976). The district court, in affirming the bankruptcy judge, determined that Decker failed to keep or preserve books of account records from which his financial condition and material business transactions might be ascertained. Because we believe that the bankruptcy judge improperly imposed on the bankrupt, rather than the Trustee, the burden of proof with regard to the adequacy of the records, we reverse.

I

2. Decker was a real estate developer in the Philadelphia area, owning and managing office buildings, luxury high-rise apartment buildings, and other income producing property. On February 12, 1971 three creditors filed an involuntary petition in bankruptcy against him. Shortly thereafter, Decker filed a voluntary petition for a real property arrangement under Chapter XII of the Bankruptcy Act, 11 U.S.C. §§ 801-926 (1976). Price Waterhouse & Co., which had been retained by Decker to assist in the preparation of a financial statement, reported that as of the date of the filings, Decker had assets of $62 million and liabilities of $56 million. However, Decker did not file a plan for the satisfaction of his debts, and on July 10, 1972 he was adjudged bankrupt.

3. On September 6, 1974 the Trustee in Bankruptcy, Morris Gerber, filed a complaint under section 14c of the Bankruptcy Act objecting to Decker's discharge in bankruptcy. After a hearing, the bankruptcy judge found no merit in the Trustee's objection and granted the discharge. The Trustee appealed and the district court remanded "for the purpose of [the Trustee's] presenting all relevant testimony to support [his] position." Before hearing the case on remand, the bankruptcy judge who had handled the case since its filing retired, and a replacement was appointed.

4. The newly appointed bankruptcy judge considered three objections by the Trustee to Decker's discharge. Two of the grounds, essentially alleging intentional concealment of property, were dismissed. However, on April 4, 1977 the bankruptcy judge denied the discharge solely on the ba-

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sis of the Trustee's third objection, that Decker had failed to keep books of account or records from which his financial condition and material business transactions might be ascertained.

5. The bankruptcy judge noted two major record keeping errors which he used to justify a denial of the discharge. First, the court listed ten specific journal entries which he stated "disclose[d] a pattern of careless, haphazard bookkeeping uniquely ill-suited to an enterprise of the size and complexity of the Decker organization." Generally, the entries illustrated Decker's failure to record major transactions until several months after they had occurred. The judge noted, however, that documentation existed to support each questionable entry. Second, and of particular importance in his opinion, the judge cited testimony by the Trustee's accountant which indicated that Decker's cash ledger account reflected at least $200,000 and perhaps as much as $370,000 for which an origin could not be ascertained. The bankruptcy judge noted that "[a]ll the other myriad inadequacies of the Bankrupt's bookkeeping system pale by comparison."

6. In reviewing the evidence, the bankruptcy judge placed the burden on the Bankrupt to disprove the Trustee's allegations of inadequate records. He stated that "[i]f the evidence is in a state of 'substantial equilibrium,' the discharge should be denied." Further, he explained that he ruled "against [the Bankrupt] only where no explanation was available." Thus, the bankruptcy judge held that Decker had not demonstrated that he had fulfilled the "high degree of duty to present to his creditors, represented by the Trustee, a substantially accurate and complete record of his affairs" and denied the discharge.

7. On appeal the district court regarded the bankruptcy court's determination that Decker's records were inadequate within the meaning of section 14c(2) as a finding of fact. Reviewing under the clearly erroneous standard, the court affirmed the denial of the discharge. Decker appeals.

II

[1] 8. Section 14a of the Bankruptcy Act, 11 U.S.C. § 32(a), provides that "the adjudication of any person, except a corporation, shall operate as an application for a discharge." A bankrupt is entitled to a discharge unless the court is satisfied that the bankrupt has committed one of the acts listed in section 14c. Here, the Trustee filed a complaint under section 14c(2).[1] To prevail, the Trustee must show that the Bankrupt failed

[1] Section 14c of the Bankruptcy Act, 11 U.S.C. § 32(c) (1976), provides in part:

"The court shall grant the discharge unless satisfied that the bankrupt has . . . (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which

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to keep or preserve books of account or records and that the failure makes it impossible to ascertain the financial condition and material business transactions of the bankrupt. *In re Leichter*, 197 F.2d 955, 958 (3d Cir. 1952), *cert. denied*, 344 U.S. 914 (1953); 1A Collier on Bankruptcy ¶ 14.33, at 1370 (14th ed. 1973). While "the statute does not exact as a condition precedent to the granting of a discharge the keeping of an impeccable system of bookkeeping which would meet the approval of a skilled accountant or records so complete that they would satisfy an expert in business," the records must "sufficiently identify the transactions that intelligent inquiry can be made of them." *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960). The test is whether "there [is] available written evidence made and preserved from which the present financial condition of the bankrupt, and his business transactions for a reasonable period in the past may be ascertained." *In re Underhill*, 82 F.2d 258, 260 (2d Cir.), *cert. denied*, 299 U.S. 546 (1936).

9. While the trial court has wide discretion in determining whether the books or records are sufficient within the meaning of the statute, *Goff v. The Russell Co.*, 495 F.2d 199, 202 (5th Cir. 1974), this court has stressed the "well-settled principles that the right to a discharge is statutory, and that Section 14 of the Bankruptcy Act must be construed strictly as against the objector and liberally in favor of the bankrupt." *In re Leichter*, 197 F.2d 955, 957 (3d Cir. 1952), *cert. denied*, 344 U.S. 914 (1953). *Accord, In re Pioch*, 235 F.2d 903, 905 (3d Cir. 1956).

10. Decker's major contention on appeal is that the bankruptcy judge improperly allocated the burden of persuasion. He points out that the judge imposed the burden on the bankrupt in accordance with the proviso to section 14c of the Bankruptcy Act. However, he contends that the proviso has been superseded by Bankruptcy Rule 407, which would place the burden, as in most civil actions, on the objector to prove that the bankrupt is not entitled to a discharge.

11. In explaining the framework in which he reviewed the evidence, the bankruptcy judge stated:

> "Once the trustee has demonstrated reasonable grounds for believing that the Bankrupt has committed the offense, the Bankrupt

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his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; . . . *Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

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has the burden of proof of persuading the court that the allegations in the specifications are untrue. If the evidence is in a state of "substantial equilibrium", the discharge should be denied because the Bankrupt has failed to carry his burden. *Gunzburg v. Johannesen*, 300 F.2d 40 (5th Circuit, 1952).

Thus, the judge applied the burden of proof as outlined in the proviso to section 14c:

> "*Provided*, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."[2]

The proviso has been interpreted as shifting the ultimate burden of persuasion, not just the burden of going forward with the evidence, to the bankrupt once the objector makes out a prima facie case that the bankrupt is not entitled to a discharge. *In re Finn*, 119 F.2d 656, 657 (3d Cir. 1941). *Accord, In re Melnick*, 360 F.2d 918, 919-20 (2d Cir. 1966); *Feldenstein v. Radio Distributing Co.*, 323 F.2d 892, 893 (6th Cir. 1963); *Johnson v. Bockman*, 282 F.2d 544, 545 (10th Cir. 1960).

12. The bankruptcy judge's citation to *Gunzburg v. Johannesen*, 300 F.2d 40 (5th Cir. 1962), leaves little doubt that he believed that as a matter of law the burden of ultimate persuasion shifted to the bankrupt once the objector made out a prima facie case. In *Gunzburg*, the court stated: "This is more than the burden of going forward with the evidence. For '. . . the bankrupt now has the risk of ultimately persuading the Court that the allegations in the specifications are untrue.' " *Id.* at 41.

13. However, Bankruptcy Rule 407 became effective on October 1, 1973. It provides:

> "At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection."

The Advisory Committee Note to Rule 407 specifically states: "The rule supersedes the proviso at the end of § 14c of the Act." The cases which have considered the effect of Rule 407 on the proviso have held that the bankruptcy judge must allocate the burden of persuasion in accordance with Rule 407. *See, e.g., Matter of Martin*, 554 F.2d 55, 58 n.1 (2d Cir. 1977); *Matter of Tucker*, 399 F. Supp. 660, 662 (S.D. Fla. 1975). The Trustee filed his complaint objecting to Decker's discharge in September,

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[2] *See* note 1 *supra*.

1974. Therefore, if Rule 407 is valid, the bankruptcy judge erred as a matter of law in applying the proviso to section 14c.

14. At argument, and for the first time in the case, the Trustee contended that Rule 407 was an impermissible exercise of the United States Supreme Court's rule-making power. Under 28 U.S.C. § 2075 (1976), the Supreme Court has the power to prescribe rules for practice and procedure under the Bankruptcy Act which do not "abridge, enlarge, or modify any substantive right."[3] The Trustee contends that Rule 407, by placing the burden of ultimate persuasion on the objector rather than the bankrupt, modifies a substantive right. There is a strong presumption, however, that the Supreme Court did not abridge or modify any substantive rights by the adoption of the Bankruptcy Rules. *Matter of Mobile Steel Co.*, 563 F.2d 692, 699 (5th Cir. 1977); *In re Wall*, 403 F. Supp. 357, 360 (E.D. Ark. 1975). Other than the naked assertion at argument, the Trustee has made no attempt to overcome that presumption. We hold that Rule 407 is a valid exercise of the Supreme Court's rule-making power and should have been applied.[4]

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[3] The Bankruptcy Rules enabling statute, 28 U.S.C. § (1976), provides:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.
>
> "Such rules shall not abridge, enlarge, or modify any substantive right.
>
> "...
>
> "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

[4] We are aware that in the context of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), "burden of proof" has been held to be substantive rather than procedural. Palmer v. Hoffman, 318 U.S. 109, 117 (1943); Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939); Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1174 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

However, as the Supreme Court noted in Hanna v. Plumer, 380 U.S. 460, 471 (1965), "[t]he line between 'substance' and 'procedure' shifts as the legal context changes." There, the Court examined whether Federal Rule of Civil Procedure 4(d)(1) prescribes the proper method of service in a diversity suit when the state statute requires in-hand service. The issue was whether the Federal Rule modified "substantive" rights, thereby exceeding the Supreme Court's rule-making powers under 28 U.S.C. § 2072 (1976). The Rules Enabling Act is virtually identical to the Bankruptcy Rules enabling statute, 28 U.S.C. § 2075. *See* note 3 *supra*. The Court rejected the outcome determinative test as the means of distinguishing between "substantive" and "procedural" under the Rules Enabling Act. Instead, it interpreted "procedural" broadly to include "matters which relate to the administration of legal proceedings." 380 U.S. at 472, *quoting* Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963).

Professor John Hart Ely in his widely cited article on the substantive/procedural distinction under the Rules Enabling Act has proposed a more elaborate definition:

> "[A] procedural rule . . . is one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to

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15. Without questioning the validity of Rule 407, at least one authority has interpreted the rule as having only limited application to section 14c(2). 12 Collier on Bankruptcy ¶ 407.3[1] (14th ed. 1975). This interpretation arises because section 14c(2) provides that the bankrupt may demonstrate an excuse for his failure to keep or preserve adequate records. Thus, the first part of section 14c(2) states the general rule: the bankrupt will not be granted a discharge if the objector establishes that the records are inadequate to disclose the bankrupt's financial condition and material business transactions. But the second part of that subsection allows the court to grant the discharge even if the records are inadequate if "the court deems such acts or failure to have been justified under all the circumstances of the case." *Collier* argues against applying Rule 407 to the "justification" provision because the information necessary to establish an excuse for inadequate or non-existent records is generally in the bankrupt's possession.

16. We need not decide whether Rule 407 requires the objector to bear the burden of persuasion on the issue of "justification." Decker has made no attempt to invoke the "justification" provision. Rather, he contends that his books and records are sufficient to entitle him to a discharge under the Act.

17. Finally, our determination that the bankruptcy judge improperly allocated the burden of persuasion is not altered by his statement at the conclusion of his opinion that he "accepted every explanation offered by the Bankrupt, ruling against him only where no explanation was available." With the burden of persuasion on the Trustee, the absence of an explanation by Decker is not enough in itself to compel the bankruptcy judge to accept the Trustee's allegations. A trial judge "is not compelled to accept a plaintiff's testimony even if uncontradicted. The plaintiff has

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get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because . . . it is a means of promoting the efficiency of the process."

Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 724-25 (1974) (footnotes omitted). *See* McCollum Aviation, Inc. v. Cim Associates, Inc., 438 F. Supp. 245, 247-48 (S.D. Fla. 1977) (adopting the Ely formulation).

We feel that the distinction between substance and procedure in the Rules Enabling Act is applicable to the Bankruptcy Rules enabling statute. The allocation of the "burden of proof" in this context is appropriately viewed as a rule of procedure "thought to be more likely to get at the truth," *id.* at 725. In fact if we were to recognize any distinction between the tests under the two statutes, we would be apt to grant the Supreme Court even greater leeway under the Bankruptcy Rules statute. Any constitutional considerations which may be inherent in a federal court's decision whether to apply the rules of a state or the Federal Rules of Civil Procedure, *see* Hanna v. Plumer, 380 U.S. at 474-78 (Harlan, J., concurring), are certainly inapplicable in the bankruptcy context, where only federal law and policy are at issue.

the burden of proof and the trial judge may find that the testimony does not carry that burden." *Santana v. United States*, 572 F.2d 331, 335 (1st Cir. 1977).

III

18. The bankruptcy judge, as affirmed by the district court, placed the ultimate burden of persuasion on the bankrupt. We hold that Bankruptcy Rule 407 supersedes the proviso to section 14c and should have been applied to impose the burden of persuasion on the Trustee. It is not for this court in the first instance to apply the appropriate burden of proof to the evidence.[5]

19. Therefore, the judgment of the district court will be *Reversed*, and the case remanded for proceedings consistent with this opinion.

In re WILLIAM MAIDMAN, Bankrupt

No. 75-1249-BK-CA-H

(S.D. Florida, March 30, 1979,
C. Clyde Atkins, Chief District Judge)

Maidman had obtained a discharge in bankruptcy. The trustee moved, in bankruptcy court, to dismiss a subsequent Chapter XI petition and to consummate a sale of assets held by the trustee. The bankruptcy court denied the trustee's motions and ordered the bankrupt to file an affidavit regarding the bidding for assets.

On appeal, the district court affirmed, holding that a Chapter XI petition may be filed at any time a case is pending, before or after adjudication. The court further held that if the affidavit filed by the bankrupt pursuant to the order of the bankruptcy court was insufficient, the sale to the trustee should be consummated.

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[5] The disposition of this case has been unnecessarily complicated by the apparent refusal of the successor bankruptcy judge to rule on whether the hearings held on remand from the district court constituted a trial de novo or merely an additional hearing to supplement the record. The transcript of the hearings reflects numerous requests by the attorneys for both sides to get these lines defined. They were not.

Because of the legal error committed by the bankruptcy judge on the allocation of the burden of proof, we have not been compelled to resolve this issue. However, to eliminate the continuation of this problem, the proceedings on remand should be de novo.